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Letter dated 31 January 2013 from the Ombudsperson to the President of the Security Council

I have the honour to submit herewith the fifth report of the Office of the Ombudsperson, pursuant to paragraph 18 (c) of annex II to Security Council resolution 2083 (2012), according to which the Ombudsperson shall submit biannual reports to the Council summarizing her activities. The report describes the activities of the Office of the Ombudsperson in the six months since the previous report was issued, covering the period from 21 July 2012 to 31 January 2013.

I would appreciate it if the present letter and the report were brought to the attention of the members of the Security Council and issued as a document of the Council.

(*Signed*) Kimberly **Prost**
Ombudsperson

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Report of the Office of the Ombudsperson pursuant to Security Council resolution 2083 (2012)

I. Background

1. The present report provides an update on the activities undertaken by the Office of the Ombudsperson since the issuance of the fourth report of the Office (S/2012/590) on 30 July 2012.

II. Activities related to delisting cases

General

2. The primary activities of the Office of the Ombudsperson during the six-month period covered by the present report related to the delisting requests submitted by individuals and entities.

Delisting cases

3. Six new cases were submitted to the Office of the Ombudsperson during the current reporting period, bringing the total number of delisting petitions submitted since the establishment of the Office to 36 as at 31 January 2013. All of the petitions were accepted and are currently at various stages of the process provided for in annex II to resolution 1989 (2011), as amended in resolution 2083 (2012). Unless requested by the petitioner, all names remain confidential while under consideration and in the event of the denial of a request or the withdrawal of a petition.

4. In total, 26 comprehensive reports have been submitted to the Committee since the Office was established. During the reporting period, the Ombudsperson submitted six reports and appeared before the Committee on four occasions to present seven cases.

5. Since the issuance of the fourth report, four individuals[1] have been delisted and one delisting request has been refused. Cumulatively, since the Office was established, 24 cases involving requests from an individual, an entity or a combination of both have been completed. As a result of the consideration of these cases, 20 individuals and 24 entities have been delisted, 1 entity has been removed as an alias of a listed entity, two delisting requests have been refused and one petition has been withdrawn. A description of the status of all of the cases as at 31 January 2013 is contained in annex I.

6. Four of the six requests submitted to the Office during the reporting period were made by individuals, and two were submitted by entities. One of the four individuals and both of the entities are represented by counsel. In total, 29 of the 36 cases were brought by individuals, 2 by an individual together with one or more entities and 5 by entities alone. In 24 of the 36 cases, the petitioner is or was assisted by legal counsel.

[1] Abdullahi Hussien Kahie, Yassin Abdullah Ezzedine Qadi, Ibrahim ben Hedhili ben Mohamed al-Hamami and Adel Abdul Jalil Ibrahim Batterjee.

Gathering of information from States

7. In the six new cases, 20 requests for information have been sent so far, to 10 States. In the six cases for which comprehensive reports were submitted to the Committee during the reporting period, replies were received from 18 of the 20 States contacted, and some States provided multiple responses. In addition, some Committee members replied with information in response to the general circulation of a petition. Importantly, in the same six cases, the designating States and States of residence all provided responses. In two cases, the State of nationality did not respond, although in both instances the petitioner had not lived in the State for a considerable period of time.

8. In all six cases for which comprehensive reports were submitted, the Ombudsperson has asked questions of relevant States. On two occasions she has met with officials in capitals to gather information on specific cases directly.

Dialogue with the petitioner

9. During the past six months, the Ombudsperson continued to communicate with petitioners during the dialogue phase of pending cases, including through e-mail exchanges, telephone discussions and, where possible, face-to-face interviews. During the reporting period, the Ombudsperson travelled to interview four petitioners in person.[2]

Access to classified or confidential information

10. Twelve agreements or arrangements for access to classified or confidential information have been entered into to date. These include a formal agreement with Austria, which became effective during the reporting period, as well as arrangements with Australia, Belgium, France, Germany, Costa Rica, Liechtenstein, New Zealand, Portugal, Switzerland and the United Kingdom of Great Britain and Northern Ireland. An additional arrangement was made with the Netherlands during the reporting period.

11. Further progress on expanding the list, particularly to other States often implicated in the delisting petitions, is urgently needed, as discussed below.

III. Summary of activities related to the development of the Office of the Ombudsperson

General

12. Activities to further develop and strengthen the Office of the Ombudsperson continued during the reporting period to the extent possible.

Outreach and publicizing of the Office

13. The Ombudsperson participated in some outreach activities but was constrained once again by limited time and resources. On 3 October 2012, the Ombudsperson participated in a panel on targeted sanctions at the annual conference

[2] In one case, security concerns prevented travel to meet the petitioner in his State of residence, and written communications were employed instead.

of the International Bar Association held in Dublin. On 15 October she made a presentation at the Washington University School of Law in St. Louis, United States of America, on the theme "Fair process and the Security Council: a case for the Office of the Ombudsperson".[3] On 29 October the Ombudsperson gave a presentation to a subcommittee of the New York Bar Association on the work of the Office. On 4 December, the Ombudsperson participated in a panel on the theme "Targeted sanctions, human rights and due process: the future of the 1267/1989 Al-Qaida sanctions regime", hosted by the Office of the United Nations High Commissioner for Human Rights and the Permanent Mission of Germany to the United Nations. On 17 December, the Ombudsperson was a keynote speaker at the Counter-Terrorism Implementation Task Force retreat, speaking on the theme "The Office of the Ombudsperson as an effective component of a counter-terrorism strategy". She also delivered remarks virtually to a panel held at Fordham Law School in New York on 26 October on the theme "Due process in United Nations sanctions committees".

Interaction with the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities and with the Monitoring Team

14. Since 30 July 2012, the Ombudsperson has appeared on four occasions before the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities: on 10 September to present the comprehensive reports in the cases of Abdullahi Hussien Kahie (delisted; formerly QI.K.50.01) and Yassin Abdullah Ezzedine Qadi (delisted; formerly QI.Q.22.01); on 6 November to present the comprehensive report in the cases of Adel Abdul Jalil Ibrahim Batterjee (delisted; formerly QI.B.182.04) and Ibrahim ben Hedhili ben Mohamed al-Hamami (delisted; formerly QI.A.98.03); on 27 November to present the comprehensive report in one case still under consideration by the Committee; and on 8 January to present the comprehensive report in two cases, of which one remains pending before the Committee and the request to delist the other was denied.[4] The Ombudsperson has also provided a number of written updates to the Committee in relation to various cases as they progress through each phase.

15. During the reporting period, the Ombudsperson continued to meet and communicate regularly with the Coordinator and members of the Monitoring Team. On an operational level, there is ongoing communication with various experts in the Monitoring Team, as appropriate to particular cases. The Monitoring Team continued to provide the Ombudsperson with relevant information in individual cases in accordance with paragraph 3 of annex II to resolution 1989 (2011), as updated in resolution 2083 (2012). The Monitoring Team also rendered considerable assistance during the reporting period by providing opinions on questions related to the development and history of Al-Qaida, as well as offering views on specific issues arising from factual scenarios in some individual cases.

[3] The video presentation is available from http://mediasite.law.wustl.edu/Mediasite/Viewer/?peid=1e4546751a1b42fe83203a356ba55a69.

[4] In cases where the request for delisting is denied, the name of the petitioner is not released unless specifically authorized.

Liaison with States, intergovernmental organizations, United Nations bodies and non-governmental organizations

16. The Ombudsperson continued to interact with States during the reporting period, with particular emphasis on States of relevance to the pending delisting petitions. The Ombudsperson also met on various occasions with counter-terrorism and sanctions experts from various States to discuss general issues. She continued to have periodic discussions with the informal group of like-minded States on targeted sanctions[5] and with representatives of the European Union. In addition to case-related travel, the Ombudsperson met with the officials of some States in the relevant capitals for discussions. In December the Ombudsperson participated in a seminar on sanctions for the new members of the Security Council hosted jointly by the Security Council Affairs Division of the Department of Political Affairs of the United Nations Secretariat and Security Council Report, Inc.

17. The Ombudsperson has maintained contact with representatives of the Counter-Terrorism Implementation Task Force and the Counter-Terrorism Committee Executive Directorate, as well as the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime. She also met with the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in the context of the preparation and presentation of his report to the General Assembly.[6] The Ombudsperson and the Special Rapporteur continue to exchange information of relevance to both of their mandates.

18. During the reporting period, the Ombudsperson interacted with civil society and non-governmental organizations through meetings with academics and representatives of relevant organizations.

Procedures and research

19. Casework, in particular during the reporting period, has involved extensive open-source research, including contacting journalists and authors to collect information and verify sources of publicly available material relating to certain cases under review.

20. The Ombudsperson continued to follow developments with regard to relevant legal cases, including, during the reporting period, the hearing on the appeal in the *Kadi II* case before the Grand Chamber of the European Court of Justice[7] and the delivery of the judgement of the European Court of Human Rights in the case of *Nada v. Switzerland*.[8] She also continued to follow relevant press articles and review reports of non-governmental organizations and academic articles pertinent to

[5] Comprising Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland.

[6] The Special Rapporteur's most recent report (A/67/396) focused on the impact of the Office of the Ombudsperson and the compatibility of its mandate with international human rights norms, on which he made a number of recommendations.

[7] *European Commission v. Kadi*, Appeal against the Judgment of the General Court (Seventh Chamber) of 30 September 2010 (*Yassin Abdullah Kadi v. European Commission*, T-85/09), European Court of Justice, case C-584/10 P (joined cases C-584/10 P, C-593/10 P and C-595/10 P).

[8] *Nada v. Switzerland*, Judgement of 12 September 2012, European Court of Human Rights, Grand Chamber (application No. 10593/08).

the work of the Office. The Ombudsperson also discussed general legal issues of relevance with counsel in the Office of Legal Affairs of the Secretariat and received assistance, especially with respect to confidentiality arrangements and agreements, from that Office.

Website

21. The website of the Office of the Ombudsperson (www.un.org/en/sc/ombudsperson) continues to be revised and updated.

IV. Other activities

Notifications of listing

22. In accordance with paragraph 16 (b) of annex II to resolution 1989 (2011) and paragraph 18 (b) of annex II to resolution 2083 (2012), when an individual or entity is added to the list and relevant States have been notified, the Ombudsperson is to send a notification directly to that individual or entity if there is a known address.

23. In the six months since the fourth report was issued, three entries have been added to the Al-Qaida sanctions list. Each of those listings was considered with reference to the question of notification. In all three cases, no addresses were available or the address information provided was insufficiently detailed for there to be any reasonable prospect of the notification reaching the addressee.

Miscellaneous matters

24. The Ombudsperson received various requests for information about the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities and provided public material in response to the requests, as appropriate. This included assistance to States seeking information or clarifications, as well as requests made by non-governmental organizations, lawyers, individuals, the media and the public.

V. Future work

25. The priorities of the Ombudsperson remain consistent. The paramount activity will continue to be that related to the delisting requests. While it is difficult to anticipate the future caseload with any certainty, on the basis of recent patterns of activity it is reasonable to assume that the Office of the Ombudsperson will receive approximately five requests in the next six-month period and that nine cases will be active at the end of the next reporting period.

26. The second matter of priority will continue to be the development of arrangements or agreements for access to classified or confidential information. The Ombudsperson will continue to carry out outreach and liaison activities to the extent that resources permit.

VI. Observations and conclusions

27. During the reporting period, the Security Council adopted resolution 2083 (2012), by which it extended the mandate of the Office of the Ombudsperson for 30 months. The resolution addresses some of the concerns about the process raised in previous reports of the Ombudsperson to the Council. The changes are discussed in the context of the general issues considered below.

Fair process achievements

28. The practice during the reporting period further showed that the Ombudsperson process operates in compliance with the fundamental principles of fairness. In each of the completed cases, including the single instance in which delisting was denied, the petitioner was made aware of the case underlying the listing, with supporting information being provided to the greatest extent possible. The petitioner had the opportunity to respond factually and detail arguments, and his or her answer was fully presented to the decision maker through the comprehensive report of the Ombudsperson. The decisions made during the reporting period were all in accordance with the recommendation of the Ombudsperson, and no matter was referred to the Security Council. With regard to the case in which delisting was refused, detailed reasons were provided by the Committee and transmitted to the petitioner in accordance with resolution 2083 (2012). Regarding the other cases completed during the reporting period, the reasons for the decision are expected but have yet to be submitted. The cases have also demonstrated the importance of the structure of the process as mandated, in particular the requirement for consensus to overturn the recommendation of the Ombudsperson, in ensuring a fair decision-making process premised solely on the information gathered by the Ombudsperson and relayed to the petitioner.

29. Overall, since the Office of the Ombudsperson became operational, the experience has been consistent in terms of fair process. The petitioner has been notified of the case against him or her and has had an opportunity to respond and be heard by the decision maker. The underlying information is reviewed and assessed by an objective third party and, since the adoption of resolution 1989 (2012), that analysis has resulted in a recommendation that forms the basis for all of the decisions taken. While the possibility of a decision being overturned by consensus or of a case being referred to the Security Council exists, in practice this has never occurred. In addition, the strict timelines imposed by the Council for the consideration of the cases have contributed to the overall fairness of the process.

30. In this light, the Ombudsperson welcomes the extension of the mandate of the Office pursuant to resolution 2083 (2012), by which the Council retained, and in some instances strengthened, those critical components of the Ombudsperson system that safeguard the fairness of the process. She also notes the extension of the term of the Ombudsperson for a 30-month period, which significantly strengthens the structure of the Office in terms of independence and contributes to enhanced efficiency.

Disclosure of the identity of the designating State

31. In paragraph 12 of its resolution 2083 (2012), the Security Council responded to the concerns raised about the disclosure of the identity of the designating State by

shifting to the relevant State the onus of specifying whether that information cannot be made known to the petitioner. This change represents noteworthy progress and will particularly assist in cases where, previously, an answer to a request for disclosure was not forthcoming. Its overall effectiveness in terms of fair process can be better assessed once the new provision is put in practice.

Cooperation of States and specificity of information

32. State cooperation in terms of responses has been very strong during the reporting period, reversing the slight trend noted in the previous report of an increase in the number of cases of non-response. All designating States and States of residence have replied in the cases completed during the reporting period. The two States that failed to respond were both States of nationality, which were contacted in accordance with the requirements of the resolution and not because of any specific expectation that the State would hold relevant information. In both instances, the petitioners had few or no connections to the State. It is also noted that the two States faced internal circumstances that may well have precluded easy access to information from authorities.

33. In contrast, however, the timeliness of responses remained problematic. Paragraph 23 of resolution 2083 (2012) contains new language that encourages the sharing of information in a timely manner. In addition, the Security Council, in paragraph 4 of annex II to the resolution, has highlighted that any challenges with regard to the gathering of information from States should be brought specifically to the attention of the Committee. These additional provisions should be useful in encouraging the cooperation of States in the Ombudsperson process, although the issue is best left assessed in the next report.

34. The most significant shortcoming with regard to cooperation, and one of the most pressing challenges to the effectiveness of the whole process, remains the lack of specificity in the material submitted by States with respect to individual cases. Of particular concern are States' responses that provide only broad assertions as to purported support activity on the part of petitioners and limited, and in some instances, no substantiating information or detail. As set out in the fourth report, in the absence of specific information, it is very difficult and in some instances impossible to properly assess the sufficiency, reasonableness and credibility of the underlying information or to have a meaningful dialogue with and receive a specific response from the petitioner. It is clear that the major impediment to the disclosure of detailed information is the confidentiality or classification restrictions applicable to the underlying information. As mentioned in paragraph 10 above, there has been some progress during the reporting period in terms of additional arrangements and agreements, including the entry into force of the formal agreement with Austria. However, more agreements and arrangements are necessary, in particular with States frequently implicated in specific cases, and practical solutions must be found if there is to be any real progress in overcoming the challenge posed by the lack of specific information. Some concerns have also arisen in recent cases as to information favourable to the petitioner's case not being produced by States. Such

material is essential to a fair process, and consideration should be given to explicit language on this issue in any future resolution.[9]

35. With additional resources now in place in the Office of the Ombudsperson, renewed efforts will be made to encourage the adoption of agreements and arrangements and to pursue the provision of more specific material of relevance to the individual listings. In this regard, the provisions of paragraph 23 of resolution 2083 (2012), by which the Council specifically urged Member States to provide all relevant information and encouraged them to enter into such arrangements or agreements, should prove helpful.

Access to exemptions

36. The fourth report highlighted problems that had arisen in some cases with regard to conducting the interview of a petitioner in the State of residence. During the reporting period, the same problem was encountered as a result of security concerns. The Security Council, in paragraph 36 of its resolution 2083 (2012), has addressed the issue, according the Ombudsperson the ability to seek an exemption from the restriction on travel for a petitioner directly from the Committee for the purpose of conducting an interview in the dialogue phase outside the State of residence of the individual. This will facilitate an important component of the Ombudsperson process that has proven to be of significant value in terms of fairness and efficiency.

37. Similarly, the Security Council, by its resolution 2083 (2012), has responded to the concerns raised in several previous reports about the inability of some individuals to obtain access to humanitarian exemptions when assistance was not easily available from the State of residence. The resolution provides that the focal point mechanism established in resolution 1730 (2006) may be used by listed individuals or entities to seek humanitarian exemptions directly as prescribed by the Council (see resolution 1452 (2002), para. 1; resolution 1989 (2011), para. 1 (b); and resolution 2083 (2012), para. 37). This is an important improvement that will allow the Committee to give consideration to requests for exemptions in cases where the listed individual or entity is unable to secure the assistance of a State in presenting such a request.

38. Unfortunately, unlike the procedure for delisting petitions sent to the Ombudsperson or even to the focal point under other regimes, which is direct and unconstrained, the process for exemptions has a prerequisite that must be met before the focal point can take any action. Specifically, the request can be received and transmitted "provided that the request has first been submitted for the consideration of the State of residence" (resolution 2083 (2012), para. 37 (a)), presumably by the individual seeking the exemption. The reasons for and the utility of the requirement are not obvious. Moreover, in States where communication facilities are limited or access to Government offices is constrained, it may prove to be an obstacle for individuals and entities seeking an exemption. It will, at the very least, delay the submission of the exemption request. In such circumstances, consideration should be given to removing or ameliorating the requirement through practice to ensure that

[9] Concerns about the non-disclosure of such information were discussed by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in paragraph 45 of his report (A/67/396).

individuals and entities have equal and open access to the exemptions prescribed by the Security Council.

Reasons for decision

39. In its resolution 2083 (2012), the Security Council fully acknowledged the importance of the Committee providing reasons for the decisions taken, whether in favour or against delisting. In recognition of the existing practice, the Committee is now mandated to give reasons for all its decisions, regardless of the outcome. The requirement will serve to demonstrate the fair and considered nature of the decision-making process and provide guidance to the Ombudsperson for subsequent delisting cases. Moreover, as the reasons will be communicated to the petitioner, he or she will be made aware of the basis of the decision and, thus, the transparency of the proceedings will be enhanced in this context. However, there remains a practical issue as to timing in that under the current practice, which is now provided for in the resolution, there has often been a significant delay before the reasons are provided. Further experience in implementing the provisions of the resolution will be needed to determine if the enhanced mandate will assist in reducing the length of time required for the transmission of the reasons for decisions.

Transparency of the process

40. Only marginal progress has been made in resolution 2083 (2012) to enhance the transparency of the Ombudsperson process. The resolution continues to describe the general procedures in detail, and two additions have been made in terms of disclosure of information about the application of the procedure in individual cases. The Ombudsperson is now specifically authorized to notify the petitioner and relevant States that are not members of the Committee of the stage reached in the process. This will be helpful in ensuring that the petitioners and interested States are kept informed of the general progress of the case. Furthermore, at the end of the consideration of the case by the Committee, the Ombudsperson may now advise interested States that are not members of the Committee of the recommendation made, which will be very beneficial to the implicated States and support the overall process by ensuring that States that are asked to cooperate will be given information on the results.

41. However, despite those developments, much of the procedure, including the critical recommendation of the Ombudsperson, remains a subject for pure speculation for the petitioner. As for the public, including such interested bodies as courts and academia, the transparency of the process is not enhanced. This is disappointing, given the importance of general transparency to the credibility of the Ombudsperson regime.

42. In addition, the decision not to provide for the disclosure of any specific information to the petitioner perpetuates inequality between petitioners. As the applicable timelines in accordance with resolution 2083 (2012) and the guidelines of the Committee for the conduct of its work are apparent from a careful review of the same,[10] petitioners or counsel who are fully acquainted with the provisions of the resolution and the guidelines will be able to deduce what the recommendation of the

[10] It will not be evident when the 30-day time period for consideration will begin, since in general the date on which translations are delivered will not be known.

Ombudsperson was and whether the "trigger mechanism" applied, a decision was overturned by consensus or the matter was referred to the Security Council, simply as a result of the time it takes for the decision. On the other hand, petitioners who are less familiar with or who have limited access to the resolution will be left largely in the dark throughout the process.

43. The decision ultimately taken by the Committee or the Security Council with respect to a delisting petition directly affects the rights of the petitioner, and thus it is essential, in the interest of fairness, that he or she be made aware of the particulars of the process in his or her case as it progresses. This should include not only general information on the timing and stages but also the critical decisions made and, for completeness, the reasoning behind the decisions.

44. With regard to the general public, the lack of disclosure of information and the reluctance to do so can only serve to raise suspicions as to the fairness and effectiveness of the Ombudsperson process.

45. Overall, while improvements have been made, the lack of transparency in the process for the petitioner and the general public remains a considerable concern.

Mandate for the follow-up of delisting

46. There has been no progress on the serious issue of continued restrictions once individuals and entities have been delisted.

47. During the reporting period, four individuals raised circumstances potentially involving the continued application of sanctions measures after their delisting, despite the Committee's decision to the contrary. All four cases, of which three related to travel restrictions and one involved seized assets, were sufficiently detailed to merit specific follow-up. However, no mandate has been given, restricting any steps that the Ombudsperson can take in relation to such situations.

48. This issue has been the subject of comment in all of the reports of the Ombudsperson to the Security Council since the Office started its operations. The principles of fairness implicated are obvious and significant. In each situation, fundamental rights — to property and to movement — are being restricted, and there is a good possibility that this is due to the improper continuation of Council sanctions measures. It may well be that the complaints are not factually supported or that the measures being imposed flow from domestic law. However, this can be determined only in the presence of a proper mechanism through which the facts can be examined. Under the current structure, no such mechanism exists, and the individuals and entities are left with limited recourse, if any.

49. These situations, if verified to be correct, represent a general problem in terms of the implementation of the Committee's decisions and have the potential to impede the credibility and effectiveness of the Al-Qaida sanctions regime. For these reasons and those expressed in the previous reports of the Ombudsperson (see S/2012/590, para. 46; S/2012/49, para. 50; and S/2011/447, para. 47), consideration should be given to mandating the Office of the Ombudsperson to follow up on claims of continued application of sanctions measures despite delisting.

Translation and administrative issues

50. As discussed in previous reports (see S/2012/590, para. 50; and S/2012/49, paras. 55-56), the general guidelines concerning word limits for translation, applicable to parliamentary documents in the United Nations system, are being applied to the comprehensive reports of the Ombudsperson. Significant problems were encountered again during the reporting period in a case in which the limits were exceeded because of the nature and complexity of the case. While a practical solution was finally found, it is not one that may be available in future cases. As a result, the word limits, when combined with the fact that translation is a prerequisite to the consideration of the report, pose a serious threat to the independence of the Ombudsperson and the effectiveness of the critical comprehensive reports.

Resources

51. Human resource needs identified in the previous reports of the Ombudsperson have now been addressed. The Office is fully staffed with a P-4 Legal Officer and a full-time assistant. During the reporting period, the critical need for translation and interpretation resources was again clearly demonstrated. This was recognized by the Security Council in paragraph 22 of its resolution 2083 (2012), in which it requested the provision of resources for that purpose. The Secretariat has advised that funds have been specifically allotted in the most current budget for translation and interpretation assistance for the Office of the Ombudsperson.

Report of the Special Rapporteur

52. In September 2012, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism submitted a report (A/67/396) focusing on fair process in the Al-Qaida sanctions regime with an emphasis on the Office of the Ombudsperson. Some specific aspects of the Ombudsperson process were addressed in detail in his report. The Special Rapporteur commented on several issues that had been addressed previously by the Ombudsperson and for which provisions have been incorporated into resolution 2083 (2012), eliminating the need to discuss those points in any detail.[11] Other issues canvassed by the Special Rapporteur are appropriate for comment in the present report, as detailed below.

Transparency

53. The Special Rapporteur has reiterated the position of the Ombudsperson calling for the disclosure of the Ombudsperson's recommendation to the petitioner. He has also gone further to recommend the general publication of the comprehensive report, subject to any necessary redactions (A/67/396, para. 50). He has argued forcefully for those steps in support of greater transparency of the process. As discussed above, the Ombudsperson agrees fully with the Special

[11] The Special Rapporteur called for the Ombudsperson to be given a role with respect to humanitarian exemptions and bringing them to the attention of the Committee. This was addressed in resolution 2083 (2012) through the focal point, who has been accorded that responsibility. The Special Rapporteur also voiced support for the need for the Ombudsperson to be able to disclose to the petitioner the identity of the designating State(s) and has called for mandatory reasons for delisting and proper resources for translation/interpretation. As discussed above, there are new provisions on these issues in resolution 2083 (2012).

Rapporteur's comments on the deficiencies in the transparency of the process. No measures to address those specific deficits were included in resolution 2083 (2012),[12] and the Ombudsperson joins the Special Rapporteur in recommending that measures be adopted in any future resolution to enhance the procedure in this respect.

Standard

54. The standard employed by the Ombudsperson for the assessment of delisting petitions is whether at present there is sufficient information to provide a reasonable and credible basis for the listing. The Special Rapporteur has noted that this is not a familiar standard, making the approach of the Ombudsperson unclear. He has gone on to provide examples of more recognized tests that fall between the criminal standard and mere suspicion.[13] In the end the Special Rapporteur argues in favour of a balance of probabilities standard in the Ombudsperson process, which, in the common law, is the highest possible standard, short of that applied in criminal matters.[14]

55. The rationale for the standard employed by the Ombudsperson is set out in detail in the document on the approach and standard prepared by the Ombudsperson (see annex II). In summary, the standard currently employed is not reflective of existing approaches found in domestic or regional law. This was a deliberate choice, given the international nature of the mechanism and the need to avoid the use of a standard drawn from one particular legal system or tradition. Instead, the standard is premised on a review of various approaches employed in different legal systems and reflects fundamental and consistent concepts, notably sufficiency, reasonableness and credibility. Practice indicates that the standard is a workable one, and the Ombudsperson remains satisfied that the test, with these well-recognized benchmarks, provides adequate clarity and consistency to the Ombudsperson process.

56. In addition, in determining an appropriate standard, the Ombudsperson has taken into account the significant rights implicated in terms of both individual rights to property and movement and collective rights to life and security, which the Security Council and the Committee are obligated to safeguard. The Ombudsperson is of the view that the standard adopted properly balances the various rights at issue, offering protections for the individual and at the same time allowing for appropriate preventive measures aimed at protecting against terrorist activity and attacks.

[12] As discussed in paragraph 40 above, there have been some improvements in terms of disclosure of status information and with respect to information provided to States that are not members of the Committee.

[13] A/67/396, para. 56 (noting that those include reasonable standards for suspicion, reasonable grounds for belief and proof on the balance of probabilities).

[14] A/67/396, para. 57 (recommending to apply the "more likely than not" standard and a proportionality test between the sanctions and the interference with the listed person or entity's fundamental rights).

Torture

57. The Special Rapporteur has expressed grave concerns as to the Ombudsperson's approach with respect to information that was or may have been obtained by torture and the fact that such information is not excluded from her assessment since she does not consider herself bound by formal rules of evidence (A/67/396, paras. 46-47). In response, the Ombudsperson has clarified her approach to the issue of torture (see annex III). In summary, rather than "admitting" or "excluding" information on any particular ground, the Ombudsperson assesses its relevance, specificity and credibility or reliability. She may, as a result, decide not to rely on any particular piece of information, especially because of its lack of credibility. The Ombudsperson considers information obtained through torture inherently unreliable. Therefore, while the process relied upon by the Ombudsperson does not include an exclusionary provision as is applicable in some domestic legal systems, the result is effectively the same, in that information obtained through torture will not be relied upon in the Ombudsperson process because of the lack of reliability. Moreover, in cases where torture is not established to the applicable standard but concerns exist, the weight of information may be affected. The Ombudsperson is fully satisfied that the process adopted with respect to information obtained by torture is consistent with international standards and norms.

Legal counsel

58. The Special Rapporteur has called for the establishment of a fund for the provision of legal assistance to petitioners seeking delisting under the Al-Qaida sanctions regime through the Ombudsperson process. While providing no comment on the substance of that recommendation, the Ombudsperson notes that in the cases considered to date, the process has been applied in an equal manner regardless of whether the petitioner has been represented by counsel or not.[15] Furthermore, given the nature of the Ombudsperson procedure, there has been no instance in which a petitioner has been prejudiced by the absence of representation.

Sufficiency of the process

59. The Special Rapporteur, in the context of his specific mandate, has given an assessment of and his opinion on the overall fairness of the Ombudsperson process and its compatibility with international minimum standards of due process. It is evidently not appropriate for the Ombudsperson to comment on such a broad question, given the nature of the mandate accorded to her. Nevertheless, the Ombudsperson emphasizes the comments in paragraphs 28 and 29 above as to the fair nature of the procedure in the individual cases that have been considered through the Ombudsperson process to date.

Conclusions

60. The workload of the Office of the Ombudsperson has remained relatively consistent over the past few reporting periods. Two and a half years into the operation of the Office, listed persons and entities continue to avail themselves of

[15] See, however, the comments in paragraph 42 above with respect to inequality arising from the lack of disclosure of the Ombudsperson's recommendations.

the procedure, a sign of the credibility of the process among relevant individuals and entities. State cooperation, which is central to the effectiveness of the mandate, remains strong and shows continued State confidence in the process. Resolution 2083 (2012) has now addressed some of the concerns that had been brought to the attention of the Security Council in previous reports. However, challenges remain, as detailed in the present report. Notably, there are problems with the content of the responses being provided by States in terms of detail and particularity, which must be addressed. In addition, enhancements in the transparency of the process are still needed. Nevertheless, despite those remaining issues, the mandate accorded to the Office of the Ombudsperson by the Council continues to be fulfilled in accordance with the fundamental principles of fairness.

Annex I

Status of cases

Case 1, one individual (status: denied)

Date	*Description*
28 July 2010	Transmission of case 1 to the Committee
28 February 2011	Comprehensive report submitted to the Committee
10 May 2011	Presentation of the comprehensive report by the Ombudsperson to the Committee
14 June 2011	Committee decision
1 September 2011	Formal notification to petitioner with reasons

Case 2, Safet Ekrem Durguti (status: delisted)

Date	*Description*
30 September 2010	Transmission of case 2 to the Committee
26 April 2011	Comprehensive report submitted to the Committee
31 May 2011	Presentation of the comprehensive report by the Ombudsperson to the Committee
14 June 2011	Committee decision to delist
12 August 2011	Formal notification to petitioner with reasons

Case 3, one entity (status: delisting request withdrawn by petitioner)

Date	*Description*
3 November 2010	Transmission of case 3 to the Committee
14 June 2011	Comprehensive report submitted to the Committee
26 July 2011	Presentation of the comprehensive report by the Ombudsperson to the Committee
2 August 2011	Withdrawal of petition

Case 4, Shafiq ben Mohamed ben Mohammed al Ayadi (status: delisted)

Date	*Description*
6 December 2010	Transmission of case 4 to the Committee
29 June 2011	Comprehensive report submitted to the Committee

Date	*Description*
26 July 2011	Presentation of the comprehensive report by the Ombudsperson to the Committee
17 October 2011	Committee decision to delist
8 November 2011	Formal notification to petitioner with reasons

Case 5, Tarek ben al-Bechir ben Amara al-Charaabi (status: delisted)

Date	*Description*
30 December 2010	Transmission of case 5 to the Committee
26 April 2011	Comprehensive report submitted to the Committee
31 May 2011	Presentation of the comprehensive report by the Ombudsperson to the Committee
14 June 2011	Committee decision to delist
12 August 2011	Formal notification to petitioner with reasons

Case 6, Abdul Latif Saleh (status: delisted)

Date	*Description*
14 January 2011	Transmission of case 6 to the Committee
17 June 2011	Comprehensive report submitted to the Committee
26 July 2011	Presentation of the comprehensive report by the Ombudsperson to the Committee
19 August 2011	Committee decision to delist
8 November 2011	Formal notification to petitioner with reasons

Case 7, Abu Sufian al-Salamabi Muhammed Ahmed Abd al-Razziq (status: delisted)

Date	*Description*
28 January 2011	Transmission of case 7 to the Committee
23 September 2011	Comprehensive report submitted to the Committee
15 November 2011	Presentation of the comprehensive report by the Ombudsperson to the Committee
30 November 2011	Committee decision to delist
13 February 2012	Formal notification to petitioner with reasons

Case 8, Ahmed Ali Nur Jim'ale and 23 entities[a] (status: delisted)

Date	*Description*
17 March 2011	Transmission of case 8 to the Committee
23 September 2011	Comprehensive report submitted to the Committee
13 December 2011	Presentation of comprehensive report by the Ombudsperson to the Committee
27 December 2011	Committee decision to delist 6 entities
21 February 2012	Committee decision to delist one individual and 17 entities
8 June 2012	Formal notification to petitioner with reasons

Case 9, Saad Rashed Mohammed al-Faqih and Movement for Reform in Arabia (status: delisted)

Date	*Description*
19 April 2011	Transmission of case 9 to the Committee
21 February 2012	Comprehensive report submitted to the Committee
17 April 2012	Presentation of the comprehensive report by the Ombudsperson to the Committee
1 July 2012	Committee decision to delist

Case 10, Ibrahim Abdul Salam Mohamed Boyasseer (status: delisted)

Date	*Description*
6 May 2011	Transmission of case 10 to the Committee
9 January 2012	Comprehensive report submitted to the Committee
1 March 2012	Presentation of the comprehensive report by the Ombudsperson to the Committee
8 May 2012	Committee decision to delist

[a] Barakaat North America, Inc., Barakat Computer Consulting, Barakat Consulting Group, Barakat Global Telephone Company, Barakat Post Express, Barakat Refreshment Company, Al Baraka Exchange, LLC, Barakaat Telecommunications Co. Somalia, Ltd., Barakaat Bank of Somalia, Barako Trading Company, LLC, Al-Barakaat, Al-Barakaat Bank, Al-Barakaat Bank of Somalia, Al-Barakat Finance Group, Al-Barakat Financial Holding Co., Al-Barakat Global Telecommunications, Al-Barakat Group of Companies Somalia Limited, Al-Barakat International, Al-Barakat Investments, Barakaat Group of Companies, Barakaat Red Sea Telecommunications, Barakat International Companies and Barakat Telecommunications Company Limited.

Case 11, Mondher ben Mohsen ben Ali al-Baazaoui (status: delisted)

Date	*Description*
1 June 2011	Transmission of case 11 to the Committee
19 January 2012	Comprehensive report submitted to the Committee
1 March 2012	Presentation of the comprehensive report by the Ombudsperson to the Committee
30 March 2012	Committee decision to delist
10 July 2012	Formal notification to petitioner with reasons

Case 12, Kamal ben Mohamed ben Ahmed Darraji (status: delisted)

Date	*Description*
30 June 2011	Transmission of case 12 to the Committee
28 February 2012	Comprehensive report submitted to the Committee
3 April 2012	Presentation of the comprehensive report by the Ombudsperson to the Committee
4 May 2012	Committee decision to delist

Case 13, Fondation Secours Mondial (status: amended)[b]

Date	*Description*
7 July 2011	Transmission of case 13 to the Committee
14 December 2011	Comprehensive report submitted to the Committee
24 January 2012	Presentation of the comprehensive report by the Ombudsperson to the Committee
17 February 2012	Committee decision to amend
9 July 2012	Formal notification to petitioner with reasons

Case 14, Sa'd Abdullah Hussein al-Sharif (status: delisted)

Date	*Description*
20 July 2011	Transmission of case 14 to the Committee
29 February 2012	Comprehensive report submitted to the Committee
3 April 2012	Presentation of the comprehensive report by the

[b] Amended to be removed as an alias of Global Relief Foundation (QE.G.91.02).

Date	*Description*
	Ombudsperson to the Committee
27 April 2012	Committee decision to delist
5 June 2012	Formal notification to petitioner with reasons

Case 15, Fethi ben al-Rebei Absha Mnasri (status: delisted)

Date	*Description*
4 August 2011	Transmission of case 15 to the Committee
9 March 2012	Comprehensive report submitted to the Committee
17 April 2012	Presentation of the comprehensive report by the Ombudsperson to the Committee
2 May 2012	Committee decision to delist

Case 16, Mounir ben Habib ben al-Taher Jarraya (status: delisted)

Date	*Description*
15 August 2011	Transmission of case 16 to the Committee
9 March 2012	Comprehensive report submitted to the Committee
17 April 2012	Presentation of the comprehensive report by the Ombudsperson to the Committee
2 May 2012	Committee decision to delist

Case 17, Rachid Fettar (status: delisted)

Date	*Description*
26 September 2011	Transmission of case 17 to the Committee
27 April 2012	Comprehensive report submitted to the Committee
5 June 2012	Presentation of the comprehensive report by the Ombudsperson to the Committee
20 June 2012	Committee decision to delist

Case 18, Ali Mohamed el Heit (status: delisted)

Date	*Description*
5 October 2011	Transmission of case 18 to the Committee

Date	*Description*
2 May 2012	Comprehensive report submitted to the Committee
3 July 2012	Presentation of the comprehensive report by the Ombudsperson to the Committee
19 July 2012	Committee decision to delist

Case 19, Yasin Abdullah Ezzedine Qadi (status: delisted)

Date	*Description*
16 November 2011	Transmission of case 19 to the Committee
11 July 2012	Comprehensive report submitted to the Committee
10 September 2012	Presentation of the comprehensive report by the Ombudsperson to the Committee
5 October 2012	Committee decision to delist

Case 20, Chabaane ben Mohamed ben Mohamed al-Trabelsi (status: delisted)

Date	*Description*
21 November 2011	Transmission of case 20 to the Committee
23 April 2012	Comprehensive report submitted to the Committee
5 June 2012	Presentation of the comprehensive report by the Ombudsperson to the Committee
20 June 2012	Committee decision to delist

Case 21, Adel Abdul Jalil Ibrahim Batterjee (status: delisted)

Date	*Description*
3 January 2012	Transmission of case 21 to the Committee
10 October 2012	Comprehensive report submitted to the Committee
6 November 2012	Presentation of the comprehensive report by the Ombudsperson to the Committee
14 January 2013	Committee decision to delist

Case 22, Ibrahim ben Hedhili ben Mohamed al-Hamami (status: delisted)

Date	*Description*
6 February 2012	Transmission of case 22 to the Committee

Date	*Description*
25 September 2012	Comprehensive report submitted to the Committee
6 November 2012	Presentation of the comprehensive report by the Ombudsperson to the Committee
21 November 2012	Committee decision to delist

Case 23, one individual (status: Committee phase)

Date	*Description*
23 February 2012	Transmission of case 23 to the Committee
30 August 2012	Comprehensive report submitted to the Committee
27 November 2012	Presentation of the comprehensive report by the Ombudsperson to the Committee

Case 24, one individual (status: Committee phase)

Date	*Description*
28 February 2012	Transmission of case 24 to the Committee
12 November 2012	Comprehensive report submitted to the Committee
8 January 2013	Presentation of the comprehensive report by the Ombudsperson to the Committee

Case 25, Abdullahi Hussien Kahie (status: delisted)

Date	*Description*
28 February 2012	Transmission of case 25 to the Committee
26 July 2012	Comprehensive report submitted to the Committee
10 September 2012	Presentation of the comprehensive report by the Ombudsperson to the Committee
26 September 2012	Committee decision to delist

Case 26, one individual (status: dialogue phase)

Date	*Description*
23 April 2012	Transmission of case 26 to the Committee
22 February 2013	Deadline for the completion of the dialogue phase

Case 27, one individual (status: dialogue phase)

Date	*Description*
7 May 2012	Transmission of case 27 to the Committee
11 February 2013	Deadline for the completion of the dialogue phase

Case 28, one individual (status: denied)

Date	*Description*
7 June 2012	Transmission of case 28 to the Committee
20 November 2012	Comprehensive report submitted to the Committee
8 January 2013	Presentation of the comprehensive report by the Ombudsperson to the Committee
8 January 2013	Committee decision
29 January 2013	Formal notification to petitioner with reasons

Case 29, one individual (status: dialogue phase)

Date	*Description*
25 July 2012	Transmission of case 29 to the Committee
11 February 2013	Deadline for the completion of the dialogue phase

Case 30, one entity (status: dialogue phase)

Date	*Description*
25 July 2012	Transmission of case 30 to the Committee
27 February 2013	Deadline for the completion of the dialogue phase

Case 31, one individual (status: dialogue phase)

Date	*Description*
1 August 2012	Transmission of case 31 to the Committee
4 March 2013	Deadline for the completion of the dialogue phase

Case 32, one individual (status: dialogue phase)

Date	*Description*
19 September 2012	Transmission of case 32 to the Committee

Date	*Description*
21 March 2013	Deadline for the completion of the dialogue phase

Case 33, one individual (status: information-gathering period)

Date	*Description*
12 October 2012	Transmission of case 33 to the Committee
13 February 2013	Deadline for information gathering

Case 34, one individual (status: information-gathering period)

Date	*Description*
8 November 2012	Transmission of case 34 to the Committee
8 March 2013	Deadline for information gathering

Case 35, one entity (status: information-gathering period)

Date	*Description*
13 December 2012	Transmission of case 35 to the Committee
15 April 2013	Deadline for information gathering

Case 36, one entity (status: information-gathering period)

Date	*Description*
13 December 2012	Transmission of case 36 to the Committee
15 April 2013	Deadline for information gathering

Annex II

Approach to and standard for analysis, observations and principal arguments

Context

Decisions regarding the Security Council's Al-Qaida and Taliban sanctions regime rest exclusively with the Security Council. With respect to the Consolidated List, the Security Council has mandated the Al-Qaida and Taliban Sanctions Committee with making determinations regarding listing and delisting in accordance with the overarching criteria set out by the Council. The creation of the Office of the Ombudsperson has not altered that decision-making structure. As a corollary, it is clearly for the Security Council and the Committee to determine what standards it will apply in taking its decisions in this context.

However, the Ombudsperson has been assigned an important role to assist the Committee in its determinations on delisting. In that role, to ensure that the analysis and observations of the Ombudsperson are provided in a fair and consistent manner from case to case, it is necessary to clearly articulate the approach being employed and the standard by which the information is to be assessed.

Both the approach and standard must be informed by the unique context of decisions being taken by a body of the Security Council and the particular role of the Ombudsperson. Further, the method and test employed must take into consideration the threat to international peace and security underlying the sanctions, as well as the serious nature of the sanctions measures when applied to individuals and entities.

Approach

The Security Council has mandated the Ombudsperson to assist the Committee with delisting requests by, inter alia, providing an analysis of, and observations on, all information available to the Ombudsperson relevant to the delisting request.

This statement provides clear guidance as to the nature of the analysis and observations expected. As the role of the Ombudsperson is to assist with delisting decisions, any comments provided should obviously relate to the question that the Committee must answer in deciding on a delisting request.

The Security Council has not defined separate criteria which must be met for delisting to occur. While resolution 1735, in paragraph 14, sets out factors of a non-exclusive nature, which the Committee "may consider",[a] in deciding on delisting, these cannot be categorized as criteria which must be met for delisting to occur.

Rather, it is evident from the relevant resolutions that the Committee, in reviewing a delisting request, will consider all of the relevant circumstances, with a view to determining whether the individual continues to meet the criteria for listing set forth by the Security Council. In essence, the test for delisting is the opposite of

[a] "*Decides* that the Committee, in determining whether to remove names from the Consolidated List, **may consider, among other things** ..." (emphasis added).

the test for listing. Therefore, in my view, the analysis and observations of the Ombudsperson should similarly focus on that question.

In addition, the Security Council has, in my opinion, unmistakably signalled that a delisting decision will be a *de novo* one which looks at the circumstances, as they stand at the time of the delisting request, to determine the appropriateness of a continued listing. In this regard, the Security Council's inclusion in resolution 1735 (2006), of "disassociation" as a factor which may be considered with reference to delisting, evidences this approach. Similarly, the reference in resolution 1904 (2009) to the removal from the Consolidated List of "members and/or associates of Al-Qaida, Usama bin Laden, or the Taliban who **no longer** meet the criteria"[b] supports a consideration of circumstances which have changed since the original listing. Further, the Security Council has plainly directed the Ombudsperson to analyse **all** the available information.[c] The absence of restrictions, particularly temporal ones, makes it evident that the assessment should address all the pertinent material, whether relied on in the context of the original decision or not.

At the same time, it is obvious that any assessment of the totality of information at present will include the historical context of the listing and, in particular, the circumstances surrounding the original designation. It is also evident that in the context of a comprehensive analysis, the absence of recent information is in no way determinative. It is simply one factor which needs to weighed and assessed on the basis of the particular circumstances in each case.

In conclusion, as the role of the Ombudsperson is to assist the Committee in its decision-making process, the analysis conducted and observations provided should relate substantively to the question to be determined by the Committee — whether an individual or entity continues to meet the criteria for being included on the Consolidated List. To accomplish this, in my opinion, the analysis and observations of the Ombudsperson, as well as the principal arguments set out, should address, to the defined standard, whether today the continued listing of the individual or entity is justified based on all of the information now available.

Standard

In aid of coherent analysis and observations from the Ombudsperson, the information gathered and the reasoning applied to it, must be assessed to a consistent standard. This standard must be one which is appropriate to the unique context of decisions by a Committee acting under the express direction of the Security Council. It must take into account the purely international framework, where the benchmark used cannot be premised on the precepts of one particular legal system or tradition. It must instead focus on concepts generally accepted as fundamental across legal systems. In order to arrive at an appropriate standard for the Ombudsperson to apply, I have looked to national and regional law and jurisprudence, particularly in the context of asset freezing or other restrictions in

[b] Paragraph 22 of resolution 1904 (2009).

[c] Paragraph 7 (c) of annex II to resolution 1904 (2009) which reads in part "Based on an analysis of all the information available to the Ombudsperson ..."

counter-terrorism regimes.[d] This research has helped to inform the development of an appropriate test in the context of the Al-Qaida and Taliban sanctions regime.

The standard must also reflect the express intent of the Security Council with regard to the purpose of the sanctions, namely "that the measures ... are preventative in nature and are not reliant upon criminal standards set out under national law". At the same time, it must be a measure of adequate substance to sustain the serious restrictions imposed on individuals and entities through the application of the sanctions.

In this regard, it is evident that the standard applicable in criminal proceedings, nationally, regionally or internationally, is not appropriate for assessing the information and circumstances related to a listing by the Committee. The sanctions are not intended to punish for criminal conduct. Rather, relevant Security Council resolutions demonstrate that the aim is twofold — to hamper access to resources in order to impede, impair, isolate and incapacitate the terrorist threat from Al-Qaida, Usama bin Laden and the Taliban, and to encourage a change of conduct on the part of those who are members of these groups or "associated with" this individual or these groups. In these circumstances, the standards applicable to a determination of criminal guilt or innocence are obviously of a different nature and serve a distinct purpose from that of the sanctions.

At the same time, the sanctions flowing from inclusion on the Consolidated List are of a significant nature. When implemented on an international scale they have a direct and considerable impact on the rights and freedoms of individuals and entities. They are also of an indeterminate length, with no specified end date. Therefore, there must be some substance and reliability to the information upon which such sanctions are applied to these individuals and entities. Mere "suspicion" or reliance upon statements without any consideration as to underlying information or some assessment of credibility is equally inapt in this context.

Finally, the standard must be informed by the wide variance of circumstances and types of information, relevant to these cases, particularly given the international nature of the listing process.

Taking into account the need to balance these factors, in my view, the standard for the Ombudsperson's analysis and observations should be **whether there is sufficient information to provide a reasonable and credible basis for the listing.**

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[d] Several States use their normal criminal or other judicial procedure for the freezing of terrorist assets and so rely on standards applicable to the initiation of a criminal investigation or prosecution or application for a judicial warrant for freezing, for example that there is "sufficient evidence" or a "strong suspicion". In the domestic designation of terrorist entities in a number of common law jurisdictions, a form of "reasonable grounds or a basis/to believe/suspect/be satisfied of" involvement in or commission of terrorist acts or activities is used. The Financial Action Task Force also recommends the alternatives of "reasonable grounds or basis/to suspect/to believe", as does the Commonwealth's Model Legislative Provisions on Measures to Combat Terrorism (reasonable grounds to suspect or to believe). In one interesting common law deviation the legislation used to designate terrorist groups requires demonstration of "sufficient cause" to uphold an unlawful association listing. The European Union uses different language again: the Council lists a person where there is precise information or material which indicates that a decision has been taken by a competent authority of a Member State based on "serious and credible evidence or clues". In a different context, article 1F of the Refugee Convention provides that protection can be refused to an individual where there are "serious reasons to consider" they have committed an international crime.

"Sufficiency" provides the necessary flexibility in terms of assessing different types of information from distinct sources, quantitatively, qualitatively and in substance. The criteria of "reasonableness and credibility" ensure that the combined circumstances provide a rational base for the listing, which is reliable enough to justify the imposition of the sanctions measures. These factors of sufficiency, reasonableness and credibility also offer appropriate benchmarks for analysing, as far as possible, underlying information, and the reasoning which is applied to it in relation to the listing. In my opinion, it is a standard which recognizes a lower threshold appropriate to preventative measures, but sets a sufficient level of protection for the rights of individuals and entities in this context.

Annex III

Approach to the assessment of information, including information alleged to have been obtained by torture

Assessment of information

In analysing gathered information, the Ombudsperson employs a methodology appropriate to an international context, which is not reliant on the procedural rules of any one legal system.[a] In addition, the method is consistent with the preventative nature of the sanction measures and the applicable criteria and standard.

Specifically, all of the information obtained will be considered in the Comprehensive Report. The Ombudsperson does not "admit" or "exclude" information or otherwise apply "rules of evidence" as recognized in some legal traditions, notably the common law. Rather, each piece of information is assessed inter alia as to relevance, specificity and credibility. In some instances, as a result of this assessment, the Ombudsperson may decide not to rely on specific information and it will not form part of the analysis or basis for the recommendation. That finding and the reasons for it will be detailed to the Committee.

In assessing the credibility/reliability of information the Ombudsperson considers factors such as detail, particularity, source (to the extent known), corroborative or reinforcing material, and whether there is similar information from different sources.

Importantly, in each case, the Ombudsperson will also look at the totality of the circumstances and the inferences to be drawn from the gathered information once cumulated.

Information alleged to have been obtained by torture

It is possible that information gathered by the Ombudsperson, relevant to a particular listing by the Al-Qaida Sanctions Committee, will be challenged by the Petitioner as having been obtained through torture. In accordance with relevant international instruments and norms,[b] any such allegation will be given careful and serious consideration by the Ombudsperson. Further, the Ombudsperson operates from the premise that information obtained through torture is inherently unreliable. As a result, such a contention is directly relevant to the credibility of the information, which is a key component of the standard applied by the Ombudsperson.[c]

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[a] This is consistent with the approach taken to the development and application of a standard for the analysis. See "Approach to, and Standard for, Analysis, Observations, Principal Arguments and Recommendation".

[b] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984, 1465 U.N.T.S. 85) ("CAT"); International Covenant on Civil and Political Rights (16 December 1966, 999 U.N.T.S. 171); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (precursor of CAT) (GA Res. 3452 (XXX), 9 Dec. 1975).

[c] The standard applied is whether there is sufficient information to provide a reasonable and credible basis for the listing.

If such impugned information is ultimately advanced in support of the listing,[d] the Ombudsperson will make inquiries of any relevant State, organization or individual and will endeavour to gather as much information as possible with respect to the assertion of torture.

If satisfied to the applicable standard[e] that the information has been obtained through torture, the Ombudsperson will not rely upon the information in the analysis and it will not form part of the basis for the recommendation. As indicated, the analysis and observation in this respect will be recounted fully to the Committee for its consideration.

Further, even if the use of torture is not demonstrated to the relevant standard, the material gathered may still be such that it will affect the weight which will be accorded to the impugned information. Once again any such determination will be detailed in the Comprehensive Report.

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[d] In two cases, the Petitioners alleged that certain information had been obtained by torture but ultimately that information was not submitted in the Ombudsperson process in support of continued listing and therefore was not considered.

[e] In the view of the Ombudsperson, the standard should be consistent with that used to assess the delisting petition generally. Thus, the question will be whether there is sufficient information to provide a reasonable and credible basis for the allegation of torture with respect to the specific information in question.